SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-504

THE NEWS-JOURNAL COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The News-Journal Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on August 19, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, p. 1a) is not yet reported. The Decision and Direction of Election is reported at 180 N.L.R.B. No. 137. The Decision and Order of the National Labor Relations Board is reported at 185 N.L.R.B. No. 40.

JURISDICTION

The judgment of the Court of Appeals (App., *infra*, p. 7a) was entered on August 19, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the result reached by the United States Court of Appeals for the Third Circuit in the present case is in conflict with the decisions of the Court of Appeals for the Fourth Circuit in *N.L.R.B.* v. *A. S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); the Court of Appeals for the Seventh Circuit in *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967) and the Court of Appeals for the Ninth Circuit in *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970).

2. Whether measurement of the amount of job skill and the potential for additional profit are proper factors to be considered in determining employment status under Section 2(3) of the Labor Management Relations Act, 29 US.C. § 152(3).

3. Whether action of petitioner in changing spots at which truckers are to deliver newspapers and in informing truckers that newspapers should be delivered in good condition defeats independent contractor status of truckers under Section 2(3) of the Labor Management Relations Act, 29 U.S.C. § 152(3).

4. Whether the National Labor Relations Board and the Court below erred in holding that the preponderance of the evidence herein showed that the contract haulers who deliver petitioner's newspapers are employees rather than independent contractors under Section 2(3) of the Labor Management Relations Act, 29 U.S.C. § 152(3).

STATUTE INVOLVED

Section 2(3) of the Labor Management Relations Act, as amended, 29 U.S.C. § 152(3) (1965) provides:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

STATEMENT

A. Background Facts

This case centers on the status under the Labor Management Relations Act of twenty-one individuals who, under the terms of a contract, transport the Petitioner's two daily newspapers from the publishing plant at Wilmington, Delaware, to various drop spots where the newspaper is further distributed to the reading public by either newsboys or motor route carriers.

The petitioner is a Delaware corporation engaged in the business of publishing and distributing two newspapers, The Morning News, and The Evening Journal,

in and around the Wilmington, Delaware area. Since World War II, the newspaper's distribution process has undergone several metamorphoses. Shortly after the War, the News-Journal utilized five persons designated as District Managers to circulate its newspapers in and around Wilmington. These District Managers purchased their newspapers from the Company, distributed and sold them, and made their own collections. That distribution process accounted for approximately one-half the circulation, the remainder being distributed by contract haulers serving the suburban and country areas around Wilmington. (JA 28).[1]

Sometime around 1946, the News-Journal eliminated the District Manager method of distribution in favor of independent trucking companies, such as Highway Express Lines. Those companies hired their own drivers and utilized their own equipment in distributing the newspapers. The District Managers became employees of the company as sales and collection men, functions which they perform today. (JA 28, 29).

In the early 1960's, the News-Journal began to phase out the trucking companies, replacing those companies with individuals who are independent contractors. At about the same time, the News-Journal automated its mailroom facilities and a number of these mailers were released from employment with severance pay. The Company offered and a number of laid-off mailers accepted written independent hauling contracts. The remaining contractors needed to implement this new system were obtained through other bids. (T. 26,

[1] References to the joint appendix, printed for use in the Court below and filed with this Petition, are shown as "JA". References to the transcript of the hearing before the Board hearing examiner are shown as "T".

29-31, JA 4). These independent contract haulers performed and still perform the identical delivery function of the predecessor trucking companies. (JA 4).

The relationship between the News-Journal and each contract hauler is basically governed by a written contract.[2] As a practical matter, the routes, the points at which bundled newspapers are delivered, and the remuneration have been the subject of oral adjustments made for the convenience and with the agreement of both parties. (JA 30, 36-37). Throughout their relationship, both the Company and the contract haulers regarded the relationship as one of independent contractor status. (T. 447, 487).

The written contract provides in the case of each contractor that the contractor shall deliver, or cause to be delivered, pre-bundled newspapers of the News-Journal to various destinations as may be from time to time established by the Company. Such deliveries are to be made as soon as reasonably possible after receiving the newspapers from the Company. (JA 103, Exhibit E. 5). In return for this service, the contractor received a weekly fixed payment. Under the written contract, it is the responsibility of the contractor to purchase and maintain his own truck(s). The contractor absorbs his operating expenses, with-

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[2] Exhibit E. 5. (JA 103) At the representation hearing, three out of the twenty-one written contracts were not located by the News-Journal. These three were either misplaced or had not been prepared. However, the three involved haulers operated under agreements with the News-Journal, the terms of which were similar, if not identical, to the terms contained in the other eighteen written contracts. One of these three haulers, William Wilson, serviced honor vending boxes owned by the Company. (JA 4)

out the right to reimbursement from the News-Journal. Also, the right to hire additional help or substitutes is within the discretion of the contractor.

The contractor, under the terms of the written contract, is free to engage in any other business, including the delivery of other newspapers or magazines, provided that such activity does not interfere with the reasonably prompt delivery of the News-Journal's newspapers. (T. 95, 455). In fact, a majority of the haulers at one time or another have operated sales or distribution routes for other products, ranging from trash collections to milk and pastry delivery sales. The method of completing delivery of the newspapers is within the control of the contractor. (JA 90, 103). Sequence of delivery at drop spots is a matter of individual contractor preference, except in isolated instances where connections must be made with feeder routes. (JA 46-47, 49-50, 90).

Although the written contract provides that it may not be modified or amended unless in writing, the parties agreed to amend the terms of the written contract involving remuneration and route designation. (JA 30, 36-37). The Company does not directly supervise the hauler and contact between the two is minimal. (T. 72, 75-76, 139, JA 49-50). If the contract hauler does not perform according to contract terms, such complaints from newspaper carriers or dealers are routed to the Company's circulation department from the District Manager, whereupon, if necessary, they are discussed with the hauler by the Circulation Director or his assistant. (JA 34, 44, 94-95). Similarly, drop spot changes due to shifting carrier or dealer requirements are transmitted in writing to the hauler at the time of pick-up (JA 41-42).

The haulers are not required to display News-Journal advertising on their trucks. If they do desire to place such advertisements on their equipment, a separate agreement for compensation is entered into by the parties. Additionally, except for occasional delivery of stakes and tubes,[3] special tasks, such as delivery of mailbags of newspapers to post offices, are specially compensated in accordance with the parties' agreement. (JA 38, 84, T. 225-26, 360, 366).

The net compensation received by the contractor depends on profits. The gross payment made by the Company to the hauler is based on the hauler's bid price, as subsequently modified by oral agreement, or on an agreed weekly sum taking into consideration the involved distance, the number of runs, stops, and newspapers. Costs of doing business, such as repairs, maintenance, licensing,[4] and insurance, as well as the initial cost of obtaining vehicles, are not subject to Company reimbursement. (JA 103). The Company keeps no personnel records on these haulers, its records being limited to only accounting, contract copies, and route descriptions. (JA 55).

B. The Representation Hearing

This litigation was initially precipitated by a union letter to the News-Journal dated February 4, 1969, which stated that the union sought representation of

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[3] Stakes and tubes are receptacles, similar to mailboxes, used in rural or suburban areas for protection and easy delivery of newspapers.

[4] A single exception is an annual fee amounting to $22.00 for newspaper distribution in the town of Elsmere, where four trucks operate, which is billed to and paid by the Company. The Wilmington head tax on employees is not imposed on the Company for these contract haulers. (JA 76).

the twenty-one contract haulers who deliver the newspapers published by the News-Journal. (T. 8-9). In response to that letter, the News-Journal asserted that the haulers were independent contractors and, accordingly, there was no appropriate unit for the union to represent. Shortly thereafter, the union filed a petition for certification with the Regional Director for the Fourth Region and hearings thereon were held in Philadelphia, Pennsylvania, on May 5, 6, 22, and 23, 1969. Pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and by direction of the Regional Director, the case was referred to the Board, which delegated its powers in connection with this case to a three-member panel. That panel, on January 21, 1970, issued its decision and direction of election, holding that the involved contract haulers were covered employees under the Act, rather than independent contractors, and that they constituted an appropriate unit. That decision and direction of election is set out at 180 N.L.R.B. No. 137, and App. p. 7a.

In this Decision and Direction of Election, the Board concluded that the truckers were employees because: (1) the services rendered consist almost exclusively of routine manual work; (2) the possibility of realizing meaningful added profit *appears* to be "very limited"; (3) the deliverers cannot decide when or whether they will go out on an assignment route; (4) they cannot fix the time of delivery of the newspaper; and (5) the territories and drop spots are pre-determined by the Petitioner. Completely ignoring the evidence indicating the truckers' true independent status, the Board relied on the character of their work and on the low-profit potential, both of which are immaterial to a section 2(3) determination. More-

over, the other factors relied upon by the Board focus primarily on the end result of the contract and not on the manner and means through which the contract is accomplished.

C. The Unfair Labor Practice Proceeding

Thereupon, on February 17, 1970, and in accordance with the January 21, 1970 direction of election, a supervised, secret-ballot election was conducted among the individuals comprising that unit, resulting in a designation and selection of the union as the collective-bargaining representative. The union was certified by the Board on February 26, 1970. Afterward and when approached by the union to collectively bargain, the News-Journal refused, still maintaining that the newspaper deliverers were independent contractors and that the unit sought to be represented by the union was inappropriate. On April 10, 1970, as a result of this refusal to bargain, the union instituted an unfair labor charge alleging that the News-Journal violated Section 8(a)(1) and (5) of the Act.

After the unfair labor charge reached issue, the counsel for the General Counsel of the Board moved for summary judgment on the pleadings and the News-Journal filed a cross-motion for summary judgment. In his motion, the Board's General Counsel argued that the issue raised by the pleadings, *i.e.*, the status of the newspaper deliverers, was foreclosed from determination in that proceeding, having already been decided at the representation stage. Seeking to vindicate its position that the deliverers were not employees within the meaning of the Act, the News-Journal's cross-motion for summary judgment again urged that the Board erred at the representation stage; and that

subsequent to the Board's Decision and Direction of Election, the Ninth Circuit in an analogous case [5] ruled that contested distributors therein were independent contractors, rather than employees as the Board had held. By so ruling, the News-Journal's motion continued, the Ninth Circuit dismissed the Board's reliance on economic controls and incentive, points heavily relied upon by the Board in the instant proceeding.

Nevertheless, the Board held that by the News-Journal's refusal to bargain with the union, it was engaging in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act. As a result, the Board, on August 27, 1970, ordered the News-Journal to cease and desist from so refusing and to take the following affirmative action: (1) bargain with the union and embody any understanding resulting therefrom in a written agreement; (2) post copies of the notice appended to the Board's August 27, 1970 order at its place of business; and (3) notify the Regional Director for Region 4 by September 7, 1970, what steps the News-Journal had taken to effect compliance therewith.

It is from this August 27, 1970 order that the News-Jurnal, on September 8, 1970, filed its petition in the Third Circuit for review.

D. The Decision of the Court Below

The Court below recognized that the record contained evidence showing, on the one hand, that the deliverers were independent contractors; and on the other hand, that the delivery men "enjoyed a somewhat different

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[5] *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970).

status." (App. p. 4a) Apparently, the "different status" enjoyed by the drivers centered on what the Court found to be "frequent" meetings between District Managers and truck drivers (App. p. 3a). Reliance on such meetings was completely misplaced, however. First, there is no evidence supporting a finding that these meetings were "frequent". Second, such meetings focused on the end result of the contract, *i.e.*, proper delivery of the newspapers (JA. 44). If newspaper bundles were delivered in a damaged condition or to the wrong drop spot, the District Manager or other company officials would, as they had a right to under the contract, bring such errors to the attention of the concerned driver. But such contact between the parties resulted only from a concern that the contract be performed as agreed. It does not defeat the drivers' status as independent contractors.

It held to be "critical" the fact that changes in the delivery schedule were made at the insistence of the Petitioner and that the Petitioner was the "sole judge" whether such changes merited corresponding adjustment in compensation. (App. p. 4a). The "right of control" test applied by the Board (180 N.L.R.B. No. 137) was less significant under the facts of this case because, according to the court, there was minimal skill, independence, and personal judgment involving these deliverers than in the cases cited to the court.[6] The court below, then, applied a test completely different than the test applied by the Board. The Board noted that the case pivoted on whether

> "the deliverer has stepped into the shoes of the predecessor trucking company as entrepreneur, or

[6] *Meyer Dairy, Inc.* v. *N.L.R.B.*, 429 F.2d 697 (10th Cir. 1970); *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970)

> whether the entrepreneur has been eliminated. The answer to this question depends on whether it may be said that the deliverers worked for wages with a right of control over performance of their jobs reserved to the Employer, or whether, like independent contractors, they undertake the job for a price, decide how the work will be done, exercise their own discretion in performing the work, and depend for their income not upon wages, but upon profits." 180 N.L.R.B. No. 137.

Moreover, the Court failed to mention, much less distinguish, *N.L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964) or *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (6th Cir. 1967).

REASONS FOR GRANTING THE WRIT

Effectively, the Court below discounted the "right of control" test sought to be applied by the Board in this case and, instead, held to be critical the fact that changes affecting the end result of the delivery contract were made at the insistence of the petitioner and that the petitioner was the sole judge whether such changes merited adjustment in compensation Moreover, the Court ratifies the error of the Board in primarily relying upon the low profit potential for and the limited skill needed by the truck-driver delivery men. In that regard the Court deviated from the test properly set out by other circuits in *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970); *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967); and *N.L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir 1964). Additionally, this case presents questions affecting a vast number of newspapers in this country which utilize distribution arrangements similar to those involved

in this appeal. See Amicus Curiae Brief in *Herald Co.* v. *N.L.R.B.*, No. 71-387, now pending in this Court.

A. The Conflict of the Circuits

In *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970) the Board found that Carnation's wholesale distributors were employees under the Act. These distributors were granted exclusive licenses to sell Carnation's products in a particular geographic area. All distributors purchased their trucks and equipment from Carnation on conditional sales contracts, secured by an assignment of the distributors' accounts receivable. Distributors' revenue was required to be deposited in a joint bank account with Carnation, from which funds could be withdrawn only over the joint signatures of the distributor and a Carnation official. The Board asserted that the economic control exercised by Carnation over its distributors was sufficient to justify its determination that the drivers were employees.

The distributors in *Carnation Company* were not permitted to sell any competitive product. They were required to display on their trucks any advertising supplied by Carnation and also were required to paint their vehicles in a specific manner. If the distributor breached his agreement, Carnation had the right to terminate with only one day notice. Upon termination, the distributor was obligated to resell his accounts receivable to Carnation. Carnation also had the right to take title to any vehicle upon which a balance was owing without the duty to account for the distributor's equity.

The Ninth Circuit recited general principles of agency as applicable in determining the status of Car-

nation's distributors and dismissed the Board "economic control" arguments by stating:

> "Most of the facts which the Board now asserts to be proof of Carnation's retention of the power to control its drivers are facts (economic rights and sanctions) which can be found in a variety of 'franchise' arrangements oriented toward brand-name protection and market penetration. In such cases there is no attempt to supervise the details of the work, and no assertion that the franchise holder is anything but an independent business man." *Carnation Company* v. *N.L.R.B.*, 429 F.2d at 1132.

Although the distributors in *N. L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964), performed a sales function, their primary responsibility was delivery of newspapers; and in that regard *Abell* is helpful in deciding this case, for those distributors were found to be independent contractors under the Act The *de minimus* controls exercised by the publisher in *Abell* are substantially similar to those exercised by the News-Journal. In the instant case, as in *Abell*, the essential business decisions concerning the operation of the route are within the discretion of the haulers. Like most independent businessmen, they may either reap the profits or bear the losses which result from their judgment.

In *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967) the distributors financed, insured and maintained their own vehicles; had their own bank accounts and filed individual income tax; determined the order of route stops; and were free to hire helpers at their own discretion. The Company did not pay workmen's compensation, unemployment insurance, social security, and did not withhold income taxes. Again, as with *Abell* and *Carnation*, the income of the distributor de-

pended entirely upon his ability to handle his route and the efficiency with which he operated his equipment.

Yet, the Court below found these cases to be inapposite because those drivers primarily performed a retail sales function. But the Court overlooked the point that the factors considered by the circuits in those decisions compel the conclusion that the deliverers in the instant case are truly independent contractors. The criteria relied upon by the Court below provide the Board with authority to find, on a wholesale basis, that in relationships with conflicting indicia of employee and independent contractor status the relationship is one of employment. After all, in practically every independent contractor arrangement there will be some evidence that can be characterized as indicating employment status. The point is that in a case where, as here, the question is close, the Board's reliance on extraneous factors such as "economic control" or "low profit potential" or minimal control over the end result, is, as these three cases disclose, wholly improper.

B. The Preponderance of the Evidence Clearly Established That the Contract Haulers Are Independent Contractors Because They Control the Manner and Means of Delivering Newspapers While the Company Controls Only the Result, i.e., the Delivery Points

Section 2(3) of the Act, 29 U.S.C. § 152(3) (1934) expressly provides that the term "employee" shall not include "any individual having the status of an independent contractor." As has been stated by the National Labor Relations Board, the legislative history of the 1947 amendments to the Act clearly shows that Congress intended that the Board recognize as employees "those who work under direct supervision," and as independent contractors, those who "undertake a job for a price, decide how the work will be done,

usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is, upon profits." *Los Angeles Evening Herald and Express Division of Hearst Publishing Company, Inc.*, 102 N.L.R.B. 102, 107-108 (1953).[7]

In determining whether the contract haulers in the present case are independent contractors and not employees subject to the Act, the familiar "right of control" test must be employed. In *Pure Seal Dairy Co.*, 135 N.L.R.B. 76, 79 (1962), quoted with approval by the Seventh Circuit in *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F2d 180, 187 (7th Cir. 1967), the Board said:

> "Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends upon the facts of each case and no one factor is determinative."

The clear preponderance of the relevant evidence shows that the individual contract haulers involved are independent contractors, rather than employees. The following factors present in this case establish a lack of the requisite control by the Company over the means by which these haulers must perform their respective jobs: the identity in function and method of operation

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[7] See also H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947); *Squirt-Nesbitt Bottling Corp.*, 130 N.L.R.B. 24 (1961); *Golden Age Dayton Corp.*, 124 N.L.R.B. 916 (1959); and Restatement (Second) of Agency § 220.

between the contract haulers and their predecessors, the trucking companies (T. 26, 29-31); contract provisions specifically define the status of the haulers as independent contractors, exclude the Company from control over the ways and means of performance, and limit the Company's sole interest to the result of performance (JA 103);[8] costs and expenses of operation are the exclusive responsibility of the hauler; the hauler's method of operation including sequence of delivery is within his discretion (T. 134, 151-152, 229, 440, 445); there is no direct supervision of haulers by the Company (T. 72, 75-76, 139, 152); personal contact between haulers and Company District Managers is casual, infrequent, and not of a supervisory nature (T. 74, 76, 256); haulers may and do take on other business on and off routes (T. 95, 455); special tasks are specially compensated by prior agreement (T. 94, 129-130, 225-226, 377, 393, 448); net compensation is the difference between compensation for services by the Company and costs of doing business not subject to reimbursement by the Company (Exhibit E. 5); haulers determine for themselves whether to hire helpers or substitutes, and what their holidays and vacations shall be[9] (T. 97, 154, 263,

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[8] It is obvious that the contract on its face does not create an employment relationship, and although this fact is not necessarily dispositive, it is of substantial import and should not have been as lightly dismissed as was done by the Board below. *N.L.R.B.* v. *A. S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); *Site Oil Co. of Missouri* v. *N.L.R.B.*, 319 F.2d 86 (8th Cir. 1963); *United Insurance Co. of America* v. *N.L.R.B.*, 304 F.2d 86 (7th Cir. 1962).

[9] The Board in its Decision and Direction of Election (JA 2) found that the haulers could hire others only in the event of illness, vacation, or excusable neglect However, there is not one scintilla of evidence to support this restrictive interpretation. Indeed, paragraph 2 of the contract provides that the contractor "shall transport and deliver or *shall cause to be transported and delivered* . . ." (Emphasis added)

334, 447): the Company does not maintain personnel records of haulers for fee or tax purposes nor does the Company absorb such expenses (T. 177-179): and haulers are not required to display Company signs or identification. (T. 94, 129-130).

Substantial reliance appeared to be placed by the Board on the fact that the services rendered by the contract haulers consist of "routine manual work of loading and driving trucks over agreed-upon routes and dropping off bundles of newspapers properly and in a pre-arranged sequence or order at designated drop spots." Rather than restricting itself to applying the "right of control" test, the Board sets new ground and now apparently measures the amount of ingenuity required by a job to determine whether the job can be the subject of an independent contract. Clearly, such a test is foreign to the determination of employee-independent contractor status under the Act. The amount of skill, intelligence, or ingenuity required by a job is not at all related to or a function of the *right* of the purported employer to control the manner and means of accomplishing a result.

The Board additionally erred in its characterization of the Company's supervision over the haulers as exerted control over the manner and means of attaining delivery. Instead, whatever control exercised by the Company over the haulers involves the result. For example, the Company designates where the bundles are to be delivered. Obviously, this is properly characterized as controlling the result for the essence of the contract is to get newspapers from one place to another. That these destination points periodically change does not affect this characterization. Indeed,

paragraph 2 of the written contracts with the haulers provides that the haulers shall deliver newspapers to "such addresses as may from time to time be designated" by the News-Journal (JA 103).

The evidence establishes that insurance against liability is regarded by the Company as a desirable protection although not a *sine qua non* of the contractual arrangement (T. 150-151, 156-157). The contract itself specifies merely that the contract hauler hold the Company harmless against liability. In any event, even were insurance required, this has not been treated as a significant factor tending to indicate an employee rather than an independent contractor relation, particularly where the Company does not pay the cost. See *Frito-Lay, Inc.* v. *N.L.R.B., supra* at 2544; *National Van Lines, Inc.* v. *N.L.R.B.*, 273 F.2d 402, at 406 (1960).

The Board scored the conditions of the contract because, as the Board states, the haulers "cannot decide when or whether they will go out on an assigned route." (JA 11). Such a position is tantamout to saying that haulers are employees because they are required to perform their contracts. Somewhat surprisingly, the Board and the Court below overlook, the fact that this is the essence of the object of the contract. If the newspapers are not delivered and on time, the contract is not performed. Obviously, this requirement affects the result. If, by this statement, the Board sought to imply that only the contrac hauler could accomplish the delivery of newspapers, it clearly is in error. Paragraphs 2 and 3 of the contract clearly permit the hauler to subcontract or hire substitutes. (JA 103).

CONCLUSION

Because there appears to be a conflict among the Circuits and because improper criteria and tests were utilized by the Board and the Court below in determining the status of the haulers herein, this petition should be granted.

Respectfully submitted,

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